STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2003
v	No. 240377 Wayne Circuit Court
NEWMAN E. JONES, Defendant-Appellant.	LC No. 01-001753

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant Newman Jones appeals as of right a conviction of first degree child abuse, MCL 750.136(b)(2), and his sentence of 60 to 180 months. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant initially makes three claims regarding ineffective assistance of counsel. A successful claim of ineffective counsel must show that the representation was below an objective standard of reasonableness and that the defendant was so prejudiced that he was denied a fair trial as required by the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994) Defendant did not seek a *Ginther*[1] hearing and therefore this review is limited to the existing record on appeal.

First, defendant claims counsel mistakenly declined jury instructions on lesser offenses as well as the instruction on parental discipline. Despite the argument made on appeal, the record indicates that the instruction on parental discipline, CJI2d 17.24, was in fact, given to the jury at trial. As for the lesser included offenses, counsel likely considered the idea that there would be a higher probability that the defendant would be convicted on less serious charges. A strategy of 'all or nothing' is a legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). This Court will not second guess counsel in matters of trial strategy, even when with hindsight, it is apparent that the strategy was unsuccessful. *People v. Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

[1] *People v Ginther*, 390 Mich 436. 443; 212 NW2d 922 (1973).

Secondly, defendant claims counsel failed to obtain records and call witnesses from the defendant's dismissed parental rights termination petition. This issue is without merit because the defendant does not demonstrate how or why any witness or record from the family division proceeding would have been relevant to support his defense. Counsel was not ineffective in failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW 2d 502 (2000).

Lastly, defendant claims counsel's failure to seek a *Walker*[2] hearing challenging the voluntariness of his statement constitutes grounds for ineffective counsel because defendant was under a great deal of pressure and duress when he made the statement. He claims that the statement may have been outcome determinative. To avoid forfeiture of this unpreserved constitutional issue on appeal, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, defendant fails to demonstrate the requisite plain error. *Id*. Once at the station, defendant acknowledged that he was aware of his right not to talk to Officer Peil and yet he volunteered to give a statement. His written statement acknowledged that he placed his son in a tub of scalding water. Defendant's testimony at trial was substantially similar to the statement given to Officer Peil. Defendant testified at trial that he was being honest with the police when he gave his statement. He did not testify that the statement was given in response to the alleged threat, but rather that he merely went to the station without his lawyer as a result of the alleged threat. *Id*. Even if counsel's failure to request a *Walker* hearing could be considered to be a plain error, defendant has not shown that it resulted in the conviction of an actually innocent defendant or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra*. No finding of plain error is warranted, nor does the defendant's position merit reversal.

Next, defendant claims the trial court erred when it admitted into evidence two gruesome photographs of the victim. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Snider*, 339 Mich App 393, 419; 608 NW2d 502 (2000) (Citations omitted). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Snider*, *supra* at 419. We find there was no abuse of discretion here. Initially, we note the jury never requested nor viewed the photographs. The trial court recognized the "gruesome" nature of the photographs and weighed their probative versus prejudicial nature. Photographs may be admitted provided they are necessary and instructive to show material facts or conditions and are not merely calculated to arouse the sympathies or prejudices of the jury. *Mills*, *supra* at 77. The weighing of the prejudicial effect of the evidence in question is "'best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v* Bahoda, 448 Mich 261, 291; 531 NW 2d 659 (1995), quoting *People v* Vandervliet, 444 Mich 52, 81; 508 NW2d 114 (1993).

[2] *People v Walker* (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).

Additionally, photographs offered for a proper evidentiary purpose "'are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.'" *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972), quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861. These two photographs, while vividly displaying the grotesque nature of this crime, were admitted to rebut any theory that the victim got into the scalding tub voluntarily. The photographs could also be admissible on grounds that they corroborated the victim's testimony that he tried to push himself out of the tub with his hands and feet. *Jones*, *supra* at 704. Additionally, photographs may be admitted to buttress the testimony of the medical examiner as to the nature and extent of the injuries. *People v Doyle* (*On Remand*), 129 Mich App 145, 156; 342 NW2d 560 (1983). The stipulated testimony of Dr. Marc Cullen indicated that the burn patterns were consistent with the victim being submerged in a tub of scalding water. The photographs were properly admitted to show that the victim was placed in the water, that he tried to get out of the tub in the manner he suggested, and to corroborate the testimony of the doctor. There was no abuse of discretion.

Finally, even where an abuse of discretion is found, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id*. at 495-96. Because the jury never requested and therefore never viewed the photos, an abuse of discretion, if it could be found, would still not warrant reversal.

Finally, defendant claims the trial court erred in scoring OV 4 as ten points and OV 7 as fifty points in sentencing defendant. In general, a trial court's sentencing determinations are reviewed for an abuse of discretion. *People v McCrady*, 213 Mich App 4774, 483; 540 NW2d 718 (1995). A determination of the existence or nonexistence of a sentencing guidelines factor is reviewed for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). The trial court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports that particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). On appeal, a trial court's scoring decision will be upheld if there is any supporting evidence in the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2000), citing *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

First, defendant argues that the trial court erred in scoring OV 4 as ten points as involving psychological trauma to the victim. We disagree. The trial judge assessed OV 4 as ten points because he reasoned that a young child, with such severe and permanent physical scars, would be psychologically scarred. At sentencing, the prosecution represented that the child's mother indicated that the child had received counseling as a result of the incident. The trial judge's finding that the injuries caused psychological trauma to the victim is supported by the evidence of the severity and permanence of the injuries to the youth.

In finding that defendant's conduct warranted a score of fifty points for OV 7, the trial judge observed that in his twenty-seven years of professional experience, he had "never ever . . . seen a situation like this where, the way this child was burned under circumstances that surely had to be at the hands of someone." The trial record amply supports the court's finding. This

nine-year-old victim was first forced to undress himself and then repeatedly beaten with a belt by defendant. The victim was forced to run his own hot bath water, for the purpose of making his welts sting. The defendant then placed the victim in water that was so hot that "his skin was falling off." The young boy suffered second and third degree burns, the most serious type, on his arms, hands, buttocks, legs and feet. Even at the time of trial, nearly a year after the crime, the victim was forced to wear pressure garments under his normal clothes. MCL 777.37(A)[3] provides that when "a victim was treated with terrorism, sadism, torture, or excessive brutality" a score of fifty points should be assessed for OV 7. MCL 777.37(1). The statute provides "'(S)adism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(2)(b). The injuries to the victim were extremely painful and were inflicted for the very purpose of producing suffering, as a way of punishing the nine-year-old boy. We conclude that the trial court did not err in finding that the defendant should be scored fifty points for OV 7. *Hornsby*, *supra* at 468.

We note that the trial court established the minimum sentence guideline range at 43 to 86 months. Using a PRV level of 17 and an OV level of 80, it appears the court incorrectly referenced the minimum sentence range for Class C felonies. MCL 777.64. First-degree child abuse should properly be considered as a Class B felony. MCL 777.16g. Given defendant's PRV and OV levels, the proper range for the minimum sentence should have been 57 to 95 months. MCL 777.63. Because defendant was sentenced to a minimum of 60 months, the error had no determinative effect on the sentence, and it is thus considered harmless. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991). No reversal is warranted.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Cavanagh
/s/ Patrick M. Meter

[3] MCL 777.37 has since been amended by PA 2002, No. 137, removing references to the word "terriorism."